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**IN THE**  
**Supreme Court of the United States**

**October Term 1958**

**No. \_\_\_\_\_**

**45**

**BEACON THEATRES, INC., a corporation,**

*Petitioner,*

*vs.*

**THE HON. HARRY C. WESTOVER, Judge of the United  
States District Court of the Southern District of  
California, Central Division, Fox West Coast Theatres  
Corporation, Pacific Drive-In Theatres, Inc.,**

*Respondent.*

**Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit.**

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THE HON. HARRY C. WESTOVER, Judge of the United  
States District Court of the Southern District of  
California, Central Division, Fox West Coast Theatres  
Corporation, Pacific Drive-In Theatres, Inc.,

*Respondent.*

\_\_\_\_\_  
**Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit.**

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Petitioner prays that a Writ of Certiorari issue to  
review the order of the United States Court of Appeals  
for the Ninth Circuit entered in the above-entitled action  
on January 7, 1958, denying Petitioner's Application for  
a Writ of Mandamus. [R. 195.]

**Opinion Below.**

The opinion of the Court of Appeals is not yet of-  
ficially reported. It is printed in Appendix B hereto,  
*infra*, p. 8.

## Jurisdiction.

The order of the Court of Appeals was entered on January 7, 1958. The jurisdiction of this Court is invoked under Title 28 U. S. C., Section 1254(1).<sup>1</sup>

## The Question Presented.

In anticipation of an imminent suit for damages by petitioner, under the Clayton and Sherman Acts (Title 15 U. S. C., Secs. 1, 2, 15) wherein petitioner as plaintiff would have been entitled to a jury trial as a matter of right, the prospective defendant (Fox West Coast Theatres Corp.) filed and served a complaint for declaratory judgment. The complaint raised substantial issues common to the impending damage suit by petitioner. Subsequently, in this action, those issues were raised by petitioner in its counterclaim for damages under the anti-trust laws, 15 U. S. C., Secs. 1, 2 and 15. The trial court held, over petitioner's objection, that it would try those common issues as a part of respondent's declaratory judgment action, without a jury, before the trial of petitioner's counterclaim, although such prior trial by the court thereby would deprive petitioner of the right to try those substantial issues to the jury.

Upon petition to the Court of Appeals for the Ninth Circuit for a Writ of Mandamus, that court held that a

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<sup>1</sup>*Norwood v. Kirkpatrick*, 349 U. S. 29, 99 L. Ed. 789, 75 S. Ct. 544. See, also, *U. S. Alkali Export Assoc. v. United States* (1944), 325 U. S. 196, 89 L. Ed. 1554; *Ex parte Simmons* (1917), 247 U. S. 231, 62 L. Ed. 1094; *Ex parte Peterson* (1920), 53 U. S. 300, 64 L. Ed. 919; *Ex parte Skinner and Eddy Corp.* (1923), 265 U. S. 86, 68 L. Ed. 912; *Los Angeles Brush Mfg. Co. v. James*, 272 U. S. 701, 71 L. Ed. 481; *Ex parte Williams*, 277 U. S. 267, 72 L. Ed. 877; *McCullough v. Cosgrave* (1944), 309 U. S. 634, 84 L. Ed. 92.

Federal Court had discretion under Rule 42(b) of the Federal Rules of Civil Procedure to deprive petitioner of its right to trial by jury on those common issues because the complaint for declaratory judgment contained allegations of petitioner's prior threats that it intended to file such a damage suit and allegations of irreparable injury resulting therefrom, thus stating a claim which was equitable in nature.

The questions presented are the following:

1. May a Federal Court, under the Seventh Amendment to the Constitution, and Rule 38 of the Federal Rules of Civil Procedure, in a civil action involving joined or consolidated equitable and legal claims, which claims include common substantial questions of fact, deprive either party of a properly demanded jury trial upon that substantial question of fact by proceeding to a previous disposition of the claim denominated "equitable" and so causing that fact to become *res judicata*.

2. Where the basic issue in a complaint seeking an injunction against a threatened action at law is in essence a defense to that impending legal action, may a litigant be deprived of a jury trial on that by its prior trial by the court as a claim "in equity", or is such deprivation of jury trial forbidden by the Seventh Amendment to the Constitution and Rule 38 of the Federal Rules of Civil Procedure.

3. May a Court of Appeals hold, under the Seventh Amendment to the Constitution and Rule 57 of the Federal Rules of Civil Procedure, that substantially common issues of fact raised in a complaint for declaratory relief, otherwise triable by a

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jury, which complaint is filed in anticipation of a suit for damages, triable as of right to a jury, may be tried to the court, without a jury, over the objection of the opposite party, because the complaint also alleges threats of that damage suit and irreparable damage resulting therefrom.

### Statutes Involved.

The pertinent statutory provisions are printed in Appendix A, *infra*, page 1.

### Statement.

This action was commenced in the United States District Court for the Southern District of California by Fox West Coast Theatres Corporation, a Delaware Corporation.<sup>2</sup>

### Legal Basis for Federal Jurisdiction Alleged in Complaint.

The complaint entitled "Complaint for Declaratory Relief" alleged:

(a) That it was brought pursuant to the Federal Declaratory Judgment Act, Title 28, U. S. C. A., Sections 2201 and 2202, for the purpose of having the court declare the rights and obligations of the parties under the facts alleged in the complaint. [Complaint, R. 15.]

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<sup>2</sup>The real parties in interest are Fox West Coast Theatres Corp., hereinafter referred to as Fox West Coast, a Delaware corporation, and Pacific Drive-in Theatres, Inc., a California corporation; the respondent Hon. Harry C. Westover is Judge of the United States District Court of the Southern District of California, Central Division, who entered the orders giving rise to this petition.

(b) That the matter in controversy arose under Sections 1 and 2 of the Sherman Act, which prohibit restraints of trade and monopoly, and under the private damage provisions of the Clayton Act which provide for a remedy in damages for private persons injured. (15 U. S. C. A., Secs. 1, 2, 15.) Diversity of citizenship and the statutory amount in controversy was also alleged. [Complaint, R. 15.]

### **The Allegations in Support of the Claims for Declaratory Relief.**

The complaint alleged:

(a) That Fox West Coast and petitioner are owners of theatres in or near the City of San Bernardino, California; that Fox West Coast had for many years owned and operated the "California Theatre" in the City of San Bernardino; and that petitioner had recently constructed a drive-in theatre, the Belair Drive-in, some eleven miles away from the California Theatre. [Complaint, R. 21.]

(b) That in an action entitled *United States v. Paramount Pictures Inc., et al.*, Eq. No. 87-273 in the United States District Court for the Southern District of New York, brought by the United States against the major distributors<sup>3</sup> in the United States, for violation of the antitrust laws, there were established judicial definitions as well as judicial restrictions on the use of "clearance" in the motion picture business. Clearance in the motion

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<sup>3</sup>The distributors, as designated in the complaint in this action, included Paramount Pictures, Inc., RKO Pictures, Inc., Warner Bros. Pictures, Inc., 20th Century-Fox Film Corp., Columbia Pictures Corp., Universal Film Exchanges, Inc., Loew's, Inc., and United Artist Corp. [Complaint, R. 18.] See *United States v. Paramount Pictures, Inc. et al.*, 66 Fed. Supp. 323, 334 U. S. 131, 85 Fed. Supp. 881.

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picture business, it was alleged was defined "as the period of time usually stipulated in license contracts which must elapse between runs of the same picture within a particular area or in specified theatres." [Complaint, R. 19.]

(c) That in that action, *United States v. Paramount Pictures, Inc., et al., supra*, decrees were entered against these designated distributors in which, among other things, said distributors were enjoined

"From granting any clearance between theatres not in substantial competition.

"From granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonable and necessary to protect the licensee in the run granted."

### **The Allegations of Opposing Contentions and Impending Legal Controversy.**

It was alleged:

(a) That prior to filing the complaint, the designated distributors had licensed or offered to license to Fox

"The complaint alleged that in the *Paramount* case, the decrees provided that the court retained jurisdiction "for the purpose of requiring any of the parties to this decree, and no others, to apply to the court at any time for such orders or direction as may be necessary or proper for the construction, modification or carrying out of the same, for the enforcement or compliance whatever or for infringement for violations thereof or for other and further relief." [Complaint, R. 20.]

The complaint also alleged that in the opinion in the *Paramount* case, the court had stated that the decisions whether in any particular case unreasonable clearances have been or are being imposed and whether clearances as between theatres which are not in substantial competition to each other have been or are being imposed should be left to local suits in the area concerned. [Complaint, R. 19.]

West Coast for its California Theatre in San Bernardino, motion pictures distributed by them on *first run*, in the San Bernardino competitive area and that they had theretofore granted, after negotiation, to Fox West Coast, for said theatre, a reasonable period of *clearance* or protection before the same picture was licensed for subsequent run exhibition in said area; that the right to negotiate for first run and for clearance over subsequent exhibition was a valuable property right, the deprivation of which would result in a substantial amount of monetary damage and loss to Fox West Coast. [Complaint, R. 21.]

(b) That petitioner had recently opened its drive-in theatre eleven miles from the Fox West Coast California Theatre, but, it was alleged, within the San Bernardino "competitive area."<sup>5</sup>

(c) That "an actual controversy relating to the legal rights and liabilities of plaintiff (Fox West Coast), and defendant (petitioner) exists and arises out of the following facts." These facts, it was alleged were:

(1) That petitioner contended that its new Belair Drive-in Theatre was *not* in substantial competition with Fox West Coast's California Theatre or with other theatres in that area, and that, therefore, petitioner contended that Fox West Coast was not entitled to negotiate with the distributors for clearance in favor of the Fox West Coast Theatre over petitioner's Belair Drive-in; that petitioner contended that it was entitled, therefore, to exhibit motion

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<sup>5</sup>It was also alleged that there were other theatres within twelve miles of the Fox West Coast Theatre which were also within the San Bernardino "competitive area." [Complaint, R. 22.]

pictures at the same time, i.e., simultaneously with Fox West Coast's California Theatre in San Bernardino, eleven miles distant.

(2) That in conflict with these contentions by petitioner, Fox West Coast contended that its California Theatre in San Bernardino was substantially competitive with petitioner's newly constructed Belair Drive-in and that all other theatres in the area were mutually substantially competitive to an extent justifying the granting of clearance to one theatre over others within the purview of the opinion and findings of the special expediting court in *United States v. Paramount, et al.*; that consequently, the granting of clearance by the distributors would not be within the injunctive provisions against granting of any clearance to theatres not in substantial competition within the meaning of the consent decrees and final decrees in the *Paramount* case.

(3) That Fox West Coast contended that it had an equal right with petitioner to negotiate with each distributor independently for a prior run for its theatre in San Bernardino ahead of any other theatre, including petitioner's Belair Drive-in, and that there was no obligation on the part of any distributor in such a case to grant an equal and simultaneous run to petitioner's Belair Drive-in Theatre. [Complaint, R. 22.]

(4) That petitioner, in addition to contending that it was not in substantial competition with the other theatres, referred to by Fox West Coast, had threatened Fox West Coast and had stated to Fox West Coast in "substance and effect" that it had threatened

the distributors that "if plaintiff's (Fox West Coast) California Theatre is granted any clearance over defendant's Belair Theatre, or is granted a prior run, such action on the part of plaintiff (Fox West Coast) will be deemed by plaintiff (petitioner) to be an overt act in concert with any distributor who may grant plaintiff such clearance or prior run in restraint of trade and in violation of the Sherman Antitrust Act, and of the decrees of the Special Expediting Court in *United States v. Paramount Pictures, Inc., et al.*, and that plaintiff will be subjected to an action by petitioner for treble damages under Sec. 4 of the Clayton Act (Title 15 U. S. C. Sec. 15)." [Complaint, R. 24.]

(5) That "said" threats and duress and coercion upon the distributors arising out of and resulting from said threats of litigation threatened and had, in fact, deprived Fox West Coast of the right to negotiate for motion pictures upon first run and to negotiate for clearance over competitive theatres including petitioner's Belair Drive-in Theatre.

(6) That Fox West Coast was without any speedy or adequate remedy at law and would be irreparably harmed unless the petitioner was restrained and enjoined from instituting any action under the anti-trust laws against plaintiff (Fox West Coast) and said distributors or any of them based upon the facts alleged, during the pendency of the action, and until such time as the court should determine whether or not the plaintiff and defendant had an equal and correlative right to license a prior run with clearance on behalf of their respective theatres. [Complaint, R. 24.]

### The Prayer for Declaratory Relief.

The complaint set forth its prayer for judgment. The prayer sought a declaration that:

1. The granting of clearance between theatres on first run in the San Bernardino competitive area, and particularly between Fox West Coast's California Theatre and petitioner's Belair Drive-in Theatre "is reasonable and is not in violation of the anti-trust laws or of the decrees of *U. S. vs. Paramount*, et al."

2. That the distributors are and each of them is entitled to negotiate with Fox West Coast and petitioner and with the other owners and operators of theatres in said competitive area equally for a prior run in said competitive area.

3. That the court declare such other rights or duties as may be necessary or proper in respect to the controversy alleged.

4. That pending final decision of the court, petitioner, Beacon Theatres, Inc., be *restrained and enjoined* "from commencing any action under the anti-trust laws of the United States against plaintiff (Fox West Coast) and against the distributors arising out of the facts or controversies alleged."

The prayer then requested that the court give such other relief, equitable or otherwise, as the court deemed proper or necessary and then sought costs. [Complaint, R. 25.]<sup>6</sup>

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<sup>6</sup>Petitioner's motion to dismiss the complaint upon the grounds that said complaint was in excess of the jurisdiction of the Federal Courts because it did not show a case or controversy, as required by Article III, Sec. 2 of the Constitution of the United States, was denied on January 17, 1957. [R. 27.] Thereafter, the real party in interest, Pacific Drive-in Theatres, Inc., intervened as a defendant. [R. 29.]

No action to obtain a *pendente lite* injunction against petitioner's filing of the antitrust case was taken by Fox West Coast. Thereafter, on February 18, 1957, as anticipated by the complaint, petitioner filed its answer, affirmative defense and counterclaim, in which it sought damages under Title 15 U. S. C. 15 for damage to its business resulting from violations of the antitrust laws. Petitioner's pleading alleged:

(a) that petitioner's Belair Drive-in Theatre was not in substantial competition with any of the theatres of Fox West Coast;

(b) that Fox West Coast and Pacific Drive-in Theatres Corporation, and certain other designated corporations, were engaged in a combination conspiracy to restrain and monopolize the exhibition of motion pictures in the San Bernardino area;

(c) that said parties had agreed, pursuant to that conspiracy, to prevent Petitioner's Belair Theatre from obtaining the privilege of exhibiting motion pictures on a first-run availability, simultaneously with the exhibition of said motion pictures in the theatres of Fox West Coast, Pacific Drive-in and others;

(d) that the continued granting of clearance to Fox West Coast over Petitioner's Drive-in Theatre, and the prevention of Petitioner's Belair Theatre, from exhibiting motion pictures simultaneously with the theatres of Fox West Coast and others, was a practice carried on pursuant to and part of a conspiracy to restrain the business of Petitioner in operating the Belair Drive-in Theatre.

Petitioner, pursuant to Rule 38 of the Federal Rules of Civil Procedure, filed and served a timely demand for jury trial as to all issues of the complaint, answer and counterclaim.

On motion of Fox West Coast, and over the objection of petitioner, the respondent, on March 21, 1957, entered an order

- (a) striking Petitioner's Demand for Jury Trial as to the complaint and answer;
- (b) striking the portions of Petitioner's answer and affirmative defense relating to antitrust violations by Fox West Coast;
- (c) directing that trial be held by the court alone on all of the issues in the complaint, including the issues in the complaint which were common to Petitioner's antitrust defenses and counterclaim, and that only after such trial that Petitioner be permitted to try the remaining issues set forth in the counterclaim to a jury. [R. 64.]

After the entry of this order, Petitioner filed an original application in the Court of Appeals seeking a Writ of Mandamus directed to the respondent Judge, requiring him to enter an order dismissing the complaint as being in excess of the jurisdiction of the United States District Court or, in the alternative, to vacate the order described above and to enter an order directing respondent to proceed with the jury trial of all issues of the complaint, answer and counterclaim triable to a jury

prior to or simultaneously with the trial by the court of any issues properly triable by the court alone.<sup>7</sup>

In its petition to the Court of Appeals, Petitioner alleged the facts hereinbefore described. Petitioner alleged that respondent's order striking petitioner's demand for jury trial as to the complaint and answer, striking the antitrust defenses of petitioner's answer, and ordering a trial without jury of the complaint, before the trial of the issues in the counterclaim, unlawfully deprived petitioner of his right to jury trial under the Seventh Amendment to the Constitution of the United States, and Rules 38 and 57 of the Federal Rules of Civil Procedure of the following matters, at least, raised by the complaint:

(a) The existence of substantial competition between Petitioner's Belair Drive-in Theatre and Fox West Coast's California Theatre;

(b) The existence of unreasonable clearance between said theatres;

(c) The relative desirability of said theatres to distributors of motion pictures as outlets for first run feature motion pictures;

(d) Whether in fact requests were made by theatres for first run availability and clearance from the various motion picture distributors.

Petitioner alleged that under the principles of estoppel or *res adjudicata*, a prior determination by the trial court

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<sup>7</sup>This is the procedure approved and required by Judge Stanley Barnes, dissenting in *Institutional Drug Distributors v. Yankwich* (C. C. A. 9, 1957), 249 F. 2d 566, 571.

without a jury would bar a subsequent jury determination of these common issues, and that, therefore, a respondent's order striking its jury demand and directing the prior court trial of the common issues unlawfully deprived petitioner of its right to jury trial of its counterclaim. The Petition for Writ of Mandamus also asserted that jurisdiction of the subject matter was lacking.<sup>9</sup>

To the order of the Court of Appeals denying the petition for Writ of Mandamus, this Petition for Certiorari is directed. The Court of Appeals for the Ninth Circuit made the following specific final decisions:

1. That in a Civil Action involving a claim which before the Federal Rules, would have been denominated a suit in equity, which claim is joined or consolidated with a claim which, before the Federal Rules, would have been denominated a claim at law, both claims including common substantial questions of fact, a Federal Court has discretion to deprive either party of a properly demanded jury trial upon that common question by proceeding to a previous disposition of the so-called equitable claim, and so causing that fact to become *res judicata*. This result, the Court held, is permitted under Federal Rules of Civil Procedure, Rule 42(b), without limitation by or consideration of the right to a jury trial under the Seventh Amendment or as guaranteed by Rule 38(a)<sup>2</sup> of the Federal Rules of Civil Procedure.

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<sup>9</sup>In the Court of Appeals, respondent filed a response. As stated by the Court of Appeals, no issue of fact with respect to the petition of Writ of Mandamus was raised by the respondent. (Appendix B.)

2. That Rule 42(b) gives the Federal Court the right to apply this procedure of pre-emption to a complaint seeking an injunction against a threatened action at law which is in essence an attempt to assert a defense to that impending legal action.

3. The Court held that although a litigant cannot be deprived of a right to jury trial as to substantial issues by the device of a prospective defendant filing a suit for declaratory judgment raising those issues, by reason of Rule 57, and the Seventh Amendment, that result can be accomplished if the complaint for declaratory judgment adds allegations of threats of litigation and irreparable injury arising therefrom. Thereby, the Court held, the complaint for declaratory judgment is converted into an "action in equity for an injunction against threats of litigation." Thereafter, the trial court has discretion to order that equity trial first.

Having determined these questions of law adversely to petitioner, the Court of Appeals held that it did not reach the question of the issuance of the Writ of Mandamus and denied the Petition.

## Reasons for Granting the Writ.

### A.

The decision of the Court of Appeals for the Ninth Circuit in the *Beacon* case is in conflict with the decision of the Court of Appeals for the Eighth Circuit in *Leimer v. Woods*, 196 F. 2d 828, and with the only definitive decisions in the Third Circuit. See, *General Motors Corp. v. California Research Corp.* (U. S. Del., 1949), 9 F. R. D. 565, and *Ryan Distributing Corp. v. Caley* (D. C. E. D. Pa.), 51 Fed. Supp. 377.<sup>9</sup>

In *Leimer v. Woods*, 196 F. 2d 828, the Court of Appeals for the Eighth Circuit held that in an action involving joined or consolidated equitable and legal causes of action, involving a common substantial question of fact, a Federal Court could not, under the Rules of Civil Procedure and the Seventh Amendment deprive either party of a properly demanded jury trial upon that question by proceeding to a previous disposition of the equitable cause of action and so cause the fact to become *res judicata*, except for special or impelling reasons which would overcome basic constitutional procedural rights. In *General Motors Corp. v. California Research Corp.*, 9 F. R. D. 965, in an action in which the plaintiff sought a declaratory judgment and an injunction restraining the bringing or the threatening of suits at law and defendant filed a counterclaim for damages, the court held

<sup>9</sup>The *Beacon* case, together with *Tanimura v. United States* (C. C. A. 9, 1952), 195 F. 2d 329 and the majority decision in *Institutional Drug Distributors Inc. v. Yankwich* (C. C. A. 1, 1957), 249 F. 2d 566, places the 9th Circuit in accord with the Court of Appeals for the 1st Circuit in *Orenstein v. United States* (C. C. A. 1, 1951), 191 F. 2d 184. The latter case has been more recently followed in the 1st Circuit in *Chappel & Co. v. Palerm Cafe Co.* (C. C. A. 1, 1957), 249 F. 2d 77 and *Delman v. Federal Products Corp.* (C. C. A. 1, 1958), 251 F. 2d 123.

that since the basic issues were legal issues, such basic issues formerly triable as of right by a jury were still triable by a jury as a matter of right.<sup>10</sup>

See also *Ryan Distributing Corp. v. Caley*, 51 Fed. Supp. 377.

The result of the ruling in the *Beacon* case is that the basic right to jury trial of common substantial issues is lost when equitable rights are also in the case. The ruling in the *Beacon* case holds that it is the exercise of the court's discretion under Rule 42b which controls the right of jury trial. Moreover, in the exercise of this discretion, the constitutional right to jury trial as to legal issues, is neither a controlling, nor even a relevant factor. This is in direct conflict with the decision in *Leimer v. Woods*, *supra*, with *General Motors Corp. v. Calif. Research Corp.*, *supra*, and is certainly in conflict in principle with the high place given to the right of jury trial by this court.

The construction of the Rules of Civil Procedure in the *Beacon* case conflicts with the enabling act, pursuant to which this Court promulgated, and the Congress adopted, the Rules of Civil Procedure. The Act of June 19, 1934, 48 Stat. 1064, 28 U. S. C. Sec. 723c, in granting the power to this court to prescribe rules of procedure, stated

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<sup>10</sup>This was the view of the Court of Appeals for the 9th Circuit prior to *Tanimura supra*. In *Bruckman v. Holzer* (C. C. A. 9, 1946), 152 F. 2d 730, Chief Judge Denman held that where common substantial issues are raised in claims formerly denominated legal and equitable, that the preservation of the right to jury trial, guaranteed by Rule 38A, and the Seventh Amendment, require the jury trial to be tried and determined first. This earlier opinion, cited with approval by many other circuit courts, is now disapproved by the *Beacon* decision. Professor Moore's views are in accord with the *General Motors* case, and the *Bruckman* case. (5 Moore Federal Practice (2d Ed.) pp. 148-158.)

in part, —“Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant.” If the rules are constructed to give to the courts the discretion to deny jury trial where, before the Rules, there was a right to such a trial, the substantive rights of litigants are clearly abridged. (Appendix A, p. 2.)

Similarly, in this manner, there is abridgment of the express provisions in the above designated statute, —“that in such union of rules, the right of trial by jury as at common law, and declared by the Seventh Amendment, that the Constitution shall be preserved to the parties inviolate.” (Appendix A, p. 3.)

It should be noted that the Federal Rules, in many instances require all claims for relief, whether formerly denominated legal or equitable, or whether available as a claim or counterclaim, or cross-claim to be filed in the same action. The requirement is enforced by loss of the claim, if it is not tendered in the same action. In other instances, where *res judicata* principles are not applicable, the policy of the rule is expressly to encourage all claims by the diverse parties to be litigated in a single action.<sup>11</sup> But, the result of the *Beacon* decision is that if a litigant voluntarily or by compulsion files legal claims where the

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<sup>11</sup>Rule 8a permits relief in the alternative or of several different types to be demanded. Rule 12b requires *every defense* to be asserted in the responsive pleading. Rule 13a requires the pleading of any counterclaim which a party has arising out of the transaction or occurrence that is the subject matter of the opposing party's claim. Rule 13b permits counterclaims against the opposing party without reference to the transaction or occurrence embodied in the claim. Rule 13g permits cross-claims against co-parties and rule 13h permits additional parties to be brought in. Rule 42a permits consolidation of actions although separately filed where such actions involved a common question of law or fact. (Appendix A, pp. 3-6.)

action also involves equitable claims, his right to jury trial is automatically lost. The litigant is thereafter subject to orders under Rule 42b, which are limited only by the court's discretion. Such a construction of the Federal Rules of Civil Procedure conflicts with the Enabling Statute cited *supra* and should be corrected by this Court.

It needs no demonstration to prove that important public policies are carried out through legislation which often provides for both legal and equitable remedies. As a result of the *Beacon* decision, the right to jury trial in such matters is uncertain, and the enforcement of those public policies are therefore uncertain.

As an example, the courts have long acknowledged that a litigant who seeks damages and an injunction in an antitrust case, does not waive the right to trial by jury. In *Ring v. Spina* (C. C. A. 2, 1948), 166 F. 2d 546, it was argued that the joinder of legal and equitable claims in the same action resulted in a waiver of the right to jury trial as a matter of law by analogy with the old equity rules wherein a joinder of legal and equitable claim resulted in such a waiver. The court rejected that contention. It held that this Court's opinion in *Fleitman v. Welsbach Street Lighting Co. of America*, 240 U. S. 27, 36 S. Ct. 233, 60 L. Ed. 505, established that a claim for damages under the antitrust laws is triable as of right by jury. The decision in the *Beacon* case now holds that this right to jury trial is lost; that if the court determines to try the antitrust issues under the equitable claim for an injunction first that Rule 42b provides the source of such power even though the effect is to destroy the right of jury trial which this Court in *Fleitman v. Welsbach Street Lighting Co. of America*, *supra*, acknowledged.

Legal and equitable remedies are made available jointly in many fields of public interest in addition to the field of antitrust enforcement. The ruling in the *Beacon* case makes the availability of such remedies, when they are sought in the same case, discretionary with the court through the simple device of pre-emption of trial under Rule 42b. The loss of jury trial rights in these areas of public interest, the uncertainty as to the availability of these remedies resulting from the *Beacon* decision and the conflict with the decisions of the statutes cited *supra*, requires this court's correction in this case.<sup>12</sup>

### B.

The decision in the *Beacon* case holds that substantive issues which would otherwise be tried as a defense to an imminent suit at law may be tried by the court without a jury when embodied in a suit for an injunction against threats of that action at law. The remedy at law is inadequate, the decision holds, under traditional tests (Title 28 U. S. C., Sec. 384), because the threatened suit was not filed before the complaint seeking the injunction was filed. The court holds that the subsequent filing of the legal claim as a counterclaim does not change this result because *American Life Insurance v. Stewart*, 300 U. S. 203, 57 S. Ct. 377, 81 L. Ed. 605, requires the test of the adequacy of the legal remedy to be made *only* as of the time the complaint was filed. This ruling on this technical question of adequacy of a legal remedy, it should be noted, determines the crucial result whereby, in this case, the issue of the legality of clearance, the central issue between the parties, will be tried by the court as part of

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<sup>12</sup>See Note, "Denial of Jury Trial By the Joinder of Legal and Equitable Claims," 39 Iowa L. Rev. 350.

the complaint "in equity" instead of by the jury as part of petitioner's action "at law" asserted as a counterclaim.

The court's holding in the *Beacon* case as to the test of the adequacy of a legal remedy is in direct conflict with the decisions of this court, both before and after the adoption of the Rules of Civil Procedure and is in conflict with the decision in *Prudential Insurance v. Saxe*, 134 F. 2d 16, a decision by the Court of Appeals for the District of Columbia.

It was well established by the decisions of this court prior to the adoption of the Federal Rules of Civil Procedure that when a defense could be interposed to an action at law and such an action was imminent or pending there was no occasion for equitable relief and the parties were left to their rights at law. In such a case, the bill was dismissed without prejudice, not because there was a want of jurisdiction in the Federal Court, but because the plaintiff had made no case for equitable relief.

In *Phoenix Mutual Life Insurance Co. v. Bailey* (1871), 13 Wall. 616, 80 U. S. 616, 20 L. Ed. 501, an insurer sued to cancel policies for fraud. An action at law later was begun to recover on them. This court's decision sustained dismissal of the bill, because the insurer had a complete remedy by way of defense in the action at law and the claimant on the policy had a right to trial by jury. (See also, to the same effect, *Adamos v. N. Y. Life Ins. Co.* (1935), 293 U. S. 386, 55 S. Ct. 315, 79 L. Ed. 444; *Enlow v. N. Y. Life Ins. Co.* (1935), 293 U. S. 379, 55 S. Ct. 310, 79 L. Ed. 440; *Cable v. U. S. Life Ins. Co.* (1903), 191 U. S. 288, 24 S. Ct. 74, 48 L. Ed. 188.)

Thus, in *Di Giorrianni v. Camden Fire Insurance Association*, 296 U. S. 64, 80 L. Ed. 47, this Court said:

"While equity may afford relief quia timet by way of cancellation of a document if there is a danger that the defense to an action at law upon it may be lost or prejudiced no such danger is apparent where, as respondent's bill affirmatively shows, the loss has occurred and suits at law on the policies are imminent and there is no showing that the defense cannot be set up and litigated as readily in a suit at law as in equity. . . . the grounds for relief for a single plaintiff which will deprive two or more defendants of their right to a jury trial must be real and substantial and its necessity must affirmatively appear (citing cases). Respondent's bill of complaint does not show that petitioners are unwilling to abide the result of a trial of one suit as controlling both;

After the adoption of the Federal Rules of Civil Procedure, this court's ruling in these cases was continued in *(Atlas Life Ins. Co. v. W. I. Southern, Inc., 306 U. S. 563, 59 S. Ct. 657, 661, 83 L. Ed. 987; N. C. Ettleson v. Metropolitan Life Ins. Co., 317 U. S. 188, 63 S. Ct. 163, 87 L. Ed. 170.)*<sup>13</sup>

The Beacon ruling is also in conflict with *Prudential Ins. Co. v. Saxe*, 134 F. 2d 16. There, the Court of Appeals for the District of Columbia, speaking through Justice Rutledge, held that under the Federal Rules of Civil Procedure, the inadequacy of a remedy at law which arises because the law action has not been filed is cured

<sup>13</sup>*American Life Insurance v. Stewart*, *supra*, on this point not *contra* since in that case there was a stipulation that the equity case be tried first. See Note *American Life Insurance Co. v. Stewart*, *supra*, 25 Georgetown Law Journal 752. See also Professor Moore's discussion of this case in 5 Moore's Practice (2d Ed.) page 155.

when, in fact, that action is filed by way of a counterclaim. The court held that to rule otherwise would be in effect to deprive the claimant of the right to jury trial, making the filing of the suits a race of diligence and do those things when the fact which renders the remedy inadequate does not exist.<sup>14</sup>

The ruling in the *Beacon* case is subject to precisely the same policy objections as was voiced by Justice Rutledge although the potential impact on the right to jury trial is even greater in the form in which it is raised in this case.

The *Beacon* case holds that standing alone alleged threats (or warnings) of an antitrust damage suit arising out of a conspiracy entitles the alleged conspirators to have a court trial on the issue of conspiracy. By parity of reasoning, alleged threats or warnings of a contract damage suit would permit a court trial on the contract issues. Similarly, threats of ordinary tort damage suits would permit a court trial of the elements of the tort claim. Easy pleading of threats or warnings of a suit at law, which warnings in our commercial society are certainly not unique, plus the preemptive procedure under Rule 42B, would thus become a far more significant determinant of jury trials than the Seventh Amendment.

But the reasoning fails and should properly be held to fail on very simple grounds. This court has since early days denied the right to abuse equitable jurisdiction.

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<sup>14</sup>The counterclaim in this action was filed in due course after the motion to dismiss was denied and the intervening defendant filed its pleading. Since the complaint requested relief *pendente lite* by way of an injunction against the filing of an antitrust case and since there was a likelihood that petitioners' claim at law would be a compulsory counterclaim here, common sense dictated that it be filed in the same case.

Chief Justice Marshall, in *Russell v. Clark Executors, et al.*, 7 Cranch 69, 89, 3 L. Ed. 271, 279, held that although bills of discovery were a basis for equitable jurisdiction "this rule cannot be abused by being employed as a mere pretext for bringing causes properly before a court of law into a court of equity." This rule has been followed by this court in many cases.

*Hipp v. Babin*, 19 How. 271, 15 L. Ed. 663;

*Scott v. Nealy*, 140 U. S. 106, 11 S. Ct. 712, 35 L. Ed. 358;

*Clark v. Roller*, 199 U. S. 541, 26 S. Ct. 141, 50 L. Ed. 300;

*Buzard v. Houston*, 119 U. S. 847, 30 L. Ed. 451.

Thus if it be true that equitable relief against a threat of an action at law is sound, it is also true that where allegations of threats of an action at law would deprive a litigant of the right of jury trial as to substantive issues, the courts hold that when the action is in fact filed the remedy at law is then adequate and the mode of trial of those issues is by jury. If thereafter injunctive relief is called for, that remedy is still available.

The ruling in the *Beacon* case should not be permitted to undermine the Seventh Amendment but should be brought into harmony by this court with the foregoing decisions in this court and other courts with which it is in direct conflict.

### C.

The decision in the *Beacon* case holds in accordance with Rule 57 of the Federal Rules of Civil Procedure and with all other courts that a declaratory judgment action against a projected legal action results in a jury

trial. This is true because in this action, as in many actions for declaratory judgment, the realistic position of the parties is reversed. The plaintiff is seeking to establish a defense against a cause of action which the declaratory defendant had intended to assert as a complaint and has in fact asserted as a counterclaim. Fox West Coast, here, has sought to anticipate imminent legal action by petitioner by seeking a declaratory judgment to the effect that it would have a good defense when that cause of action was asserted. Where the complaint in an action for declaratory relief seeks in essence to assert a defense to an impending or threatened complaint at law, it is the character of the threatened complaint at law, and not of the defense, which will determine the right to jury trial.

5 Moore's Federal Practice (2nd Ed.) p. 213.

The Court of Appeals for the 9th Circuit has held that in a declaratory relief suit against a projected legal action "the entire case must be submitted to a jury." (*Pacific Indemnity v. McDonald* (C. C. A. 9, 1938), 107 F. 2d 446.) In support thereof, see also *Hargrove v. American Cent. Ins. Co.* (C. C. A. 10, 1942), 125 F. 2d 225; *United States Federal & Guaranty Co. v. Koch* (C. C. A. 3, 1939), 102 F. 2d 288; *Aetna Cas. Co. v. Quarles* (C. C. A. 4, 1937), 92 F. 2d 321.

But the *Beacon* decision also holds that in a declaratory relief action if the complaint alleges *per se* that the declaratory defendant threatened an action at law and further alleges irreparable injury from those threats, the declaratory relief action is thereby converted into an action which prior to the Federal Rules would have been denominated an "action in equity." This hold-

ing is in direct conflict with the decision of the Court of Appeals for the Second Circuit in *Leach v. Ross Heating & Mfg. Co.* (C. C. A. 2, 1931), 104 F. 2d 88. There the court of appeals held that in a suit for an injunction against patent infringement, a counterclaim which sought a declaration of patent invalidity, and also alleged threats of litigation by the patentee, resulting in damage, stated a counterclaim for declaratory judgment only. Judge Learned Hand expressly pointed out that the counterclaim could not be considered as anything more than a declaratory judgment suit, although it asked for an injunction against threats to defendant's customers. Judge Hand said "such threats give rise to a cause of action only in case the party who makes them refuses to test his right in court."<sup>15</sup> (See *Asbestos Shingle, Slate & Sheathing Co. v. H. W. Johns-Manville Co.*, 189 Fed. 611, opinion by Judge L. Hand.)

Thus it is that the *Beacon* decision, following the prior decision of the Court of Appeals for the 9th Circuit in *MGM v. Fear*, 104 F. 2d 892, is in direct conflict with *Leach v. Ross Heating and Mfg. Co.* and with the following decisions:

*Bechick Products v. Flexible Products* (C. C. A. 2, 1955), 225 F. 2d 603;

*Kaplan v. Helenhart Novelty Corp.* (C. C. A. 2, 1955), 182 F. 2d 314;

*Zephyr American Corp. v. Bates Mfg. Co.* (C. C. A. 3, 1941), 128 F. 2d 380;

*Johnson Laboratories Inc. v. Meissner Mfg. Co.* (C. C. A. 7), 98 F. 2d 937.

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<sup>15</sup>This language is part of the dissenting opinion but on this issue there was no disagreement by the court.

See:

*Virtue v. Creamery Package Mfg. Co.*, 227 U. S. 8, 37-38, 33 S. Ct. 202, 208, 57 L. Ed. 393;  
98 A. L. R. 671.

These latter decisions all hold that bare allegations of threats of a suit at law without allegations of a refusal to test the right asserted in court, or other allegations of malice or bad faith, do not state an independent claim in equity.

Moreover, the presence in a claim for declaratory judgment of allegations of threats to sue are precisely for the purpose of establishing an actual existing legal controversy which is a requirement of a declaratory judgment suit in the Federal Court by reason of Article III, Section 2 of the Constitution of the United States.

*Maryland Casualty Co. v. Pacific Coal and Oil Co.*, 312 U. S. 270, 85 L. Ed. 826;

*Dewey and Almy-Chemical Co. v. American Anode* (C. C. A. 3, 1943), 137 F. 2d 68;

*Arlac v. Hat Corporation of America* (C. C. A. 3, 1948), 166 F. 2d 286);

*Brisk Water Proofing Co. v. Belanger & Sons* (C. C. A. 1. 1954), 209 F. 2d 169.

In the instant case, for example, there was no contractual or other business relationship between petitioner and Fox West Coast. Their mere disagreement as to legality of clearance and substantial competition would constitute a dispute but not a legal controversy. Immediate impact of these disagreements by way of threatened litigation, as alleged, therefore was pleaded to support the crucial element under Article III, Section 2 of the Constitution.

Thus, the complaint was only for declaratory judgment and the holding that it was "in equity" is in direct conflict with the foregoing designated decisions.

Rule 57 of the Federal Rules of Civil Procedure was intended to guarantee that the procedural device of declaratory judgments should not destroy the right of jury trial. To hold that allegations of threatened action at law *per se* create a cause of action which would be denominated in equity would provide a too easy mechanism for subverting the obvious policy of the rules which is to protect the right to jury trial in declaratory judgment actions.

D.

This court has often granted certiorari to consider questions of importance in the administration of the lower Federal courts, particularly in those cases where if the matter is to be promptly settled at all it must be settled by this court. Thus, in *Norwood v. Kirkpatrick*, 349 U. S. 29, 99 L. Ed. 789, 75 S. Ct. 544, the Court of Appeals for the Third Circuit had denied an application for mandamus or prohibition to a district Judge to require him to set aside orders transferring a cause under 28 U. S. C. 1404A. This court granted writ of certiorari to review that denial of an application for mandamus. In the instant case, as in *Norwood v. Kirkpatrick*, *supra*, there are presented important issues in the administration of the trial courts. Every day the trial courts are presented with the question of the determination as to the mode of trial, jury or non-jury, in civil actions. By reason of the encouragement and requirements of the Rules of Civil Procedure, joined or consolidated legal and equitable claims are often presented;

so too are claims under the Declaratory Judgment Act. (Title 28, Secs. 2201, 2202, Appendix A, *supra*, p. 2). The employment of improper standards for determining the relationship between the right of litigants to jury trial and the right of the Federal courts to determine the order of trial in such cases can play havoc with the orderly administration of justice.

The order of the respondent Judge, affirmed by the Court of Appeals in the *Beacon* decision, with complete finality, deprived petitioner of a jury trial as to basic, fundamental factual issues in the complaint and in petitioner's counterclaim for damages for violations of the antitrust laws. Wrongful deprivation of jury trial, standing alone, has long been held by this court to provide sufficient foundation for the issuance from this court even of common law Writs of Certiorari, as well as Mandamus, under 28 U. S. C. 1651 (the All-Writs Statute). (*United States Alkali Export Assoc. v. United States* (1944), 325 U. S. 196, 89 L. Ed. 1554 (Writ of Certiorari); *Ex parte Simmons* (1917), 247 U. S. 231, 62 L. Ed. 1094 (Mandamus); *Ex parte Peterson*, (1920), 253 U. S. 300, 64 L. Ed. 919 (Mandamus); *Ex parte Skinner and Eddy Corp.* (1923), 265 U. S. 86, 68 L. Ed. 912 (Mandamus).) Extraordinary writs were issued out of this court to compel a trial court to vacate its reference of patent suits to a Master. (*McCullough v. Cosgrave* (1944), 309 U. S. 634, 84 L. Ed. 992; *Los Angeles Brush Mfg. Co. v. James*, 272 U. S. 701, 71 L. Ed. 481.) Similarly, this court directed trial by a 3-judge Court in lieu of trial before a single judge by Mandamus. (*Ex parte Williams*, 277 U. S. 267, 72 L. Ed. 877; *Ex parte Collins*, 277 U. S. 565, 72 L. Ed. 990.)

This Court has held that the proper administration of the working rules of the Federal Courts are its primary responsibility. (*La Buy v. Howes Letter Co., Inc.*, 352 U. S. 249.)

The procedural rules embodied in the Federal Rules of Civil Procedure and the Declaratory Judgment Act are of course "substantive" in the most practical meaning of that term. As they affect the right to jury trial these rules become implements for the protection or the destruction of rights guaranteed by the Constitution. The instant decision is destructive of substantive Constitutional rights, is in conflict in fact and in principle with the decisions of this Court and other Courts of Appeal as argued herein, and should therefore be reviewed and reversed by this Court.

### Conclusion.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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